Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1339

IN THE

Supreme Court of the United States

October Term, 1982

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, KENNETH DEEGAN, EDWARD THOMPSON, JOSEPH CLEMENTE and KATHLEEN FERRARO,

Petitioners,

-v.-

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, ELLA OWENS, CARRIE HOWARD, THELMA LATTA, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CASES

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ARGUMENT

The respondents, Housing Help, a low income housing sponsor, and several low income and minority citizens, brought this action challenging the Town of Huntington's refusal to provide multi-family zoning to enable construction of a housing project for low income persons. The project is to be located outside the deteriorating predominantly black area of Hunting-

ton, in an almost all white neighborhood. Housing Help had planned to subsidize this project with funds from the Department of Housing & Urban Development's (HUD) Section 8 low income housing program.

The principle claim is that denial of zoning for the project violates the Federal Fair Housing Law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.* The district court dismissed the complaint for lack of standing. It held that the remedy sought by respondents, construction of the project, was speculative as HUD had insufficient Section 8 appropriations for fiscal year 1981 to fund any projects in the county where Huntington is located. The Second Circuit, relying on this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), reversed. The appellate court held that the lack of Section 8 funds for a particular fiscal year was insufficient reason to deny standing. The court found that "where long term financing is the issue, it is particularly unreasonable to ask plaintiffs to prove more than some reasonable prospects of future financing." 689 F.2d at 394. A petition for rehearing *en banc* was thereafter denied.

The *Arlington Heights* case presented a factual pattern virtually identical to the instant case. There, too, the municipality challenged standing as the housing sponsor did not have a HUD funding commitment. This Court, in upholding the standing of the low income plaintiff, stated that "all housing developments are subject to some extent to similar uncertainties." 429 U.S. at 261. The Second Circuit, in applying the *Arlington Heights* holding, stressed the similarities between the housing proposed in that case and the project Housing Help seeks to construct.

> The record here indicates a sufficiently similar degree of detail on the part of Housing Help. An option to purchase the 14.6 acre site upon which Matinecock Court would be built is alleged to have been secured and detailed plans as to the number and nature of the dwelling units have been drafted. Like *Arlington Heights*, "[t]he challenged action . . . stands as an absolute barrier to constructing the housing [Housing

> Help desires] to place on the [Greenhaven/East Northport] site. [Village of Arlington Heights, *supra.* at 261]. Invalidation of the challenged ordinance, therefore, would tangibly improve the chances of construction of Matinecock Court. 689 F.2d at 395.

As the *Arlington Heights* case established, fluctuations in levels of funding appropriations do not determine standing to challenge discriminatory local zoning. Indeed, the amount of Section 8 funds available in 1981 was of no real significance as Housing Help would first have had to overturn Huntington's discriminatory zoning before it could have obtained a Section 8 allocation. Fiscal 1981 funds could therefore never have been used for the Housing Help project and it would be illogical to tie the respondents' standing to the Section 8 appropriations in that year. As the Second Circuit stated, "Indeterminacy of financing alone, however, is not enough to dismiss such an action, since the multitude of factors affecting ultimate financing capability are too variable to permit certainty in prediction. . . . [D]ismissal of a complaint because of a lack of committed financing may well prevent any litigant from challenging a zoning ordinance." 689 F.2d at 394.

The petitioner argues that this Court should grant *certiorari* in order to clarify a point left open by the *Arlington Heights* decision. In a footnote this Court stated: "Whether termination of all available assistance programs would preclude standing is not a matter we need to decide in view of the current likelihood that subsidies may be secured under [Section 8]." 429 U.S. at 261, n. 7. The record in the instant case establishes that the Section 8 program has not been terminated – there has only been a decrease in Section 8 appropriations. See Joint Appendix in Second Circuit at 112a. Therefore, this case does not involve a situation where there has been a termination of all available assistance programs.

Even if there had been a termination of the Section 8 program, dismissal of the complaint would be inappropriate. This

Court has repeatedly emphasized that as a case progresses, amendments to the complaint are to be allowed to provide additional facts in support of a plaintiff's standing to sue. See *Warth v. Seldin*, 422 U.S. 490, 501-502 (1975). Thus, should the Section 8 program be terminated, Housing Help must be given an opportunity to amend the complaint to set forth alternative plans for financing its project.

Additionally, there is no merit to the petitioner's alternative argument that the Second Circuit decision somehow will enmesh the federal courts in a mountain of zoning cases. Unquestionably, Title VIII jurisdiction is present in the instant matter and is not lost simply because the claim arises in a zoning context. Indeed, in *Arlington Heights* this Court remanded for a determination of the plaintiffs' Title VIII allegations and the Seventh Circuit thereafter established Title VIII guidelines. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. den. 434 U.S. 1025 (1978). See also *Resident Advisory Bd. v. Rizzo*, 564 F.2d 125 (3d Cir. 1977), cert. den. 435 U.S. 908 (1978).

CONCLUSION

All of the issues presented by the petitioners have previously been resolved by this Court and the Second Circuit properly applied the *Arlington Heights* ruling. The petition should, therefore, be denied.

Respectfully submitted,

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